(b) *Other than deposition.* For evidence other than deposition evidence:

(1) *Objection.* Any objection must be served within five business days of service of evidence, other than deposition evidence, to which the objection is directed.

(2) *Supplemental evidence.* The party relying on evidence for which an objection is timely served may respond to the objection by serving supplemental evidence within ten business days of service of the objection.

(c) *Motion to exclude.* A miscellaneous motion to exclude evidence must be filed to preserve any objection. The motion must identify the objections in the record in order and must explain the objections.

(d) *Motion in limine.* A party may file a miscellaneous motion in limine for a ruling on the admissibility of evidence.

[69 FR 50003, Aug. 12, 2004, as amended at 69 FR 58260, Sept. 30, 2004]

§ 41.156 Compelling testimony and production.

(a) *Authorization required.* A party seeking to compel testimony or production of documents or things must file a miscellaneous motion for authorization. The miscellaneous motion must describe the general relevance of the testimony, document, or thing and must:

(1) In the case of testimony, identify the witness by name or title, and

(2) In the case of a document or thing, the general nature of the document or thing.

(b) *Outside the United States.* For testimony or production sought outside the United States, the motion must also:

(1) *In the case of testimony.* (i) Identify the foreign country and explain why the party believes the witness can be compelled to testify in the foreign country, including a description of the procedures that will be used to compel the testimony in the foreign country and an estimate of the time it is expected to take to obtain the testimony; and

(ii) Demonstrate that the party has made reasonable efforts to secure the agreement of the witness to testify in the United States but has been unsuccessful in obtaining the agreement, even though the party has offered to pay the expenses of the witness to travel to and testify in the United States.

(2) *In the case of production of a document or thing.* (i) Identify the foreign country and explain why the party believes production of the document or thing can be compelled in the foreign country, including a description of the procedures that will be used to compel production of the document or thing in the foreign country and an estimate of the time it is expected to take to obtain production of the document or thing; and

(ii) Demonstrate that the party has made reasonable efforts to obtain the agreement of the individual or entity having possession, custody, or control of the document to produce the document or thing in the United States but has been unsuccessful in obtaining that agreement, even though the party has offered to pay the expenses of producing the document or thing in the United States.

§ 41.157 Taking testimony.

(a) *Form.* Direct testimony must be submitted in the form of an affidavit except when the testimony is compelled under 35 U.S.C. 24, in which case it may be in the form of a deposition transcript.

(b) *Time and location.* (1) *Uncompelled direct testimony* may be taken at any time; otherwise, testimony may only be taken during such time period as the Board may authorize.

(2) *Other testimony.* (i) Except as the Board otherwise orders, authorized testimony may be taken at any reasonable time and location within the United States before any disinterested official authorized to administer oaths at that location.

(ii) Testimony outside the United States may only be taken as the Board specifically directs.

(c) *Notice of deposition.* (1) Prior to the taking of testimony, all parties to the proceeding must agree on the time and place for taking testimony. If the parties cannot agree, the party seeking the testimony must initiate a conference with the Board to set a time and place.

(2) Cross-examination should ordinarily take place after any supplemental evidence relating to the direct testimony has been filed and more than a week before the filing date for any paper in which the cross-examination testimony is expected to be used. A party requesting cross-examination testimony of more than one witness may choose the order in which the witnesses are to be cross-examined.

(3) In the case of direct testimony, at least three business days prior to the conference in paragraph (c)(1) of this section, the party seeking the direct testimony must serve:

(i) A list and copy of each document under the party's control and on which the party intends to rely, and

(ii) A list of, and proffer of reasonable access to, any thing other than a document under the party's control and on which the party intends to rely.

(4) Notice of the deposition must be filed at least two business days before a deposition. The notice limits the scope of the testimony and must list:

(i) The time and place of the deposition,

(ii) The name and address of the witness,

(iii) A list of the exhibits to be relied upon during the deposition, and

(iv) A general description of the scope and nature of the testimony to be elicited.

(5) *Motion to quash.* Objection to a defect in the notice is waived unless a miscellaneous motion to quash is promptly filed.

(d) *Deposition in a foreign language.* If an interpreter will be used during the deposition, the party calling the witness must initiate a conference with the Board at least five business days before the deposition.

(e) *Manner of taking testimony.* (1) Each witness before giving a deposition shall be duly sworn according to law by the officer before whom the deposition is to be taken. The officer must be authorized to take testimony under 35 U.S.C. 23.

(2) The testimony shall be taken in answer to interrogatories with any questions and answers recorded in their regular order by the officer, or by some other disinterested person in the presence of the officer, unless the presence of the officer is waived on the record by agreement of all parties.

(3) Any exhibits relied upon must be numbered according to the numbering scheme assigned for the contested case and must, if not previously served, be served at the deposition.

(4) All objections made at the time of the deposition to the qualifications of the officer taking the deposition, the manner of taking it, the evidence presented, the conduct of any party, and any other objection to the proceeding shall be noted on the record by the officer. Evidence objected to shall be taken subject to a ruling on the objection.

(5) When the testimony has been transcribed, the witness shall read and sign (in the form of an affidavit) a transcript of the deposition unless:

(i) The parties otherwise agree in writing, (ii) The parties waive reading and signature by the witness on the record at the deposition, or

(iii) The witness refuses to read or sign the transcript of the deposition.

(6) The officer shall prepare a certified transcript by attaching to the transcript of the deposition a certificate in the form of an affidavit signed and sealed by the officer. Unless the parties waive any of the following requirements, in which case the certificate shall so state, the certificate must state:

(i) The witness was duly sworn by the officer before commencement of testimony by the witness;

(ii) The transcript is a true record of the testimony given by the witness;

(iii) The name of the person who recorded the testimony and, if the officer did not record it, whether the testimony was recorded in the presence of the officer;

(iv) The presence or absence of any opponent;

(v) The place where the deposition was taken and the day and hour when the deposition began and ended;

(vi) The officer has no disqualifying interest, personal or financial, in a party; and

(vii) If a witness refuses to read or sign the transcript, the circumstances under which the witness refused.

(7) The officer must promptly provide a copy of the transcript to all parties.

The proponent of the testimony must file the original as an exhibit.

(8) Any objection to the content, form, or manner of taking the deposition, including the qualifications of the officer, is waived unless made on the record during the deposition and preserved in a timely filed miscellaneous motion to exclude.

(f) *Costs.* Except as the Board may order or the parties may agree in writing, the proponent of the testimony shall bear all costs associated with the testimony, including the reasonable costs associated with making the witness available for the cross-examination.

§ 41.158 Expert testimony; tests and data.

(a) Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight. Testimony on United States patent law will not be admitted.

(b) If a party relies on a technical test or data from such a test, the party must provide an affidavit explaining:

(1) Why the test or data is being used,

(2) How the test was performed and the data was generated,

(3) How the data is used to determine a value,

(4) How the test is regarded in the relevant art, and

(5) Any other information necessary for the Board to evaluate the test and data.

Subpart E—Patent Interferences

§ 41.200 Procedure; pendency.

(a) A patent interference is a contested case subject to the procedures set forth in subpart D of this part.

(b) [Reserved]

(c) Patent interferences shall be administered such that pendency before the Board is normally no more than two years.

[69 FR 50003, Aug. 12, 2004, as amended at 75 FR 19559, Apr. 15, 2010]

§ 41.201 Definitions.

In addition to the definitions in §§ 41.2 and 41.100, the following definitions apply to proceedings under this subpart:

Accord benefit means Board recognition that a patent application provides a proper constructive reduction to practice under 35 U.S.C. 102(g)(1).

Constructive reduction to practice means a described and enabled anticipation under 35 U.S.C. 102(g)(1) in a patent application of the subject matter of a count. *Earliest constructive reduction to practice* means the first constructive reduction to practice that has been continuously disclosed through a chain of patent applications including in the involved application or patent. For the chain to be continuous, each subsequent application must have been co-pending under 35 U.S.C. 120 or 121 or timely filed under 35 U.S.C. 119 or 365(a).

Count means the Board's description of the interfering subject matter that sets the scope of admissible proofs on priority. Where there is more than one count, each count must describe a patentably distinct invention.

Involved claim means, for the purposes of 35 U.S.C. 135(a), a claim that has been designated as corresponding to the count.

Senior party means the party entitled to the presumption under § 41.207(a)(1) that it is the prior inventor. Any other party is a *junior party*.

Threshold issue means an issue that, if resolved in favor of the movant, would deprive the opponent of standing in the interference. Threshold issues may include:

(1) No interference-in-fact, and

(2) In the case of an involved application claim first made after the publication of the movant's application or issuance of the movant's patent:

(i) Repose under 35 U.S.C. 135(b) in view of the movant's patent or published application, or

(ii) Unpatentability for lack of written description under 35 U.S.C. 112(a) of an involved application claim where the applicant suggested, or could have suggested, an interference under § 41.202(a).

[69 FR 50003, Aug. 12, 2004, as amended at 77 FR 46631, Aug. 6, 2012]